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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

No. 802

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, PETITIONERS,

vs.

ANGUS J. DE PINTO, HJALMAR B. LANDOE, FRANCIS I. SABO, EDWIN B. PEGRAM AND ELMER W. DUHAME, RESPONDENTS.

BRIEF OF RESPONDENT ANGUS J. DE PINTO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CROSS PETITION FOR WRIT OF CERTIORARI

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CROSS PETITION OF ANGUS J. DE PINTO FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF OF RESPONDENT ANGUS J. DE PINTO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent Angus J. DePinto, and presents this brief in opposition to the Petition for Writ of Certiorari filed herein by the Petitioners, Provident Security Life Insurance Company and John S. Gorsuch and Albert J. Doig.

QUESTIONS PRESENTED FOR REVIEW

Petitioners' statement of the first question presented for review is substantially correct: Under the Seventh Amendment, is the defendant in a stockholder's derivative action entitled to a trial by jury with respect to any claim made on behalf of the corporation which is cognizable in an action at common law? It is our position, however, that this action, in its present posture, is not a stockholder's derivative action.

We disagree with Petitioners' statement as to the second question presented for review. Petitioners take the position that the Court of Appeals held that the District Court was without power to enter a Judgment N.O.V. for plaintiff pursuant to Civil Rule 50(b), irrespective of whether or not there were genuine issues as to material facts. On the contrary, the Court based its decision upon the recognition that the amount of damages was disputed.

STATEMENT OF THE CASE

Petitioners' statement of the case creates the inference that the evidence conclusively established Respondent's liability and the amount of damages. We do not deem it appropriate at this juncture to burden the Court with a resume of the evidence. With respect to the question of Respondent's liability, we deem it suffucient to point out that he was not a member of the Board of Directors of United at the time of, nor did he participate in, the alleged wrongful withdrawal of assets therefrom. His resignation as a member of the Board of Directors had been accepted prior thereto. He was not aware that such transaction took place until approximately one year after it occurred. (R. 1816) The damages sustained by United as a result of the transfer of assets to American cannot be measured by the value of such assets. United received in exchange for such assets 30,800 shares of the capital stock of American. (R. 340) Upon the transfer of such assets to Kelly, American acquired 38,799.89 shares (approximately 38.79%) of the capital stock of United. These shares were subsequently cancelled when United merged with Provident. (323 F. 2d 838, Note 31)

ARGUMENT

I

THE SEVENTH AMENDMENT PRESERVES TO THE DEFENDANT IN A STOCKHOLDER'S DERIVATIVE ACTION THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY CLAIM MADE ON BEHALF OF THE CORPORATION WHICH IS COGNIZABLE IN AN ACTION AT COMMON LAW.

Petitioners concede that had this action been instituted by United against Respondent he would have been entitled to a jury trial. The claim of the corporation is for damages resulting from the alleged negligence of Respondent. Petitioners contend, however, that because the action was commenced by a stockholder, Respondent was—by this circumstance—deprived of his right to a jury trial. Petitioners present a very narrow and rigid argument: A stockholder's derivative action is a suit in equity. Jury trials are unknown to equity. The Seventh Amendment preserves the right of trial by jury only in suits at common law. The right to trial by jury has not been expanded or restricted by the Federal Rules of Civil Procedure. Ergo, a defendant does not have a right to trial by jury in a stockholder's derivative action. The vice in Petitioners' line of reasoning lies in the assumption that a court of equity—in the face of defendant's insistence upon his rights under the Seventh Amendment—may enforce the legal rights of the corporation without a jury trial.

As early as 1915, this Court, in *Fleitmann v. Welsbach Street Lighting Company*, 240 U. S. 27, affirmed

the dismissal of a bill of equity instituted by a stockholder on behalf of Consolidated Street Lighting Company for the purpose of compelling the defendants to pay to the company threefold damages under the Sherman Act. This Court pointed out that when a penalty of triple damages is sought to be inflicted, the Sherman Act should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. Justice Holmes, speaking for the Court, stated:

> "Of course, the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore, the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue, * * * "

It is true that under the specific provisions of the Sherman Act, a claim for triple damages can only be enforced by a jury trial. It would appear, however, from the language of Justice Holmes that there was no intention to draw a distinction between the right to jury trial granted or preserved by statute as compared with the right to jury trial granted by the common law and preserved by the Seventh Amendment.

In 1953 the United States Court of Appeals (2nd Cir.) in *Fanchon & Marco, Inc. v. Paramount Pictures*, 202 F. 2d 731, decided that Fleitmann was not an insurmountable obstacle to the maintenance of a stockholder's derivative action under the antitrust laws. The Court stated:

"* * * But the issue of treble damages may perhaps cause confusion hereafter, as its premonition has already caused upset below. So we shall discuss it briefly. The only case directly in point is the Fleitmann case; the others cited held merely that a derivative action could not be brought 'at law' under the then procedure. The Fleitmann case does hold specifically that a party is entitled to a verdict of the jury against him before he can be forced to pay treble damages under 15 U. S. C. A. § 15. This perfectly reasonable view of the policy of the statutory remedy can be enforced without any difficulty in the merged procedure of the present rules. The two major issues of right of the shareholder to sue and of violation of the antitrust laws causing damage to the corporation can be tried side by side or otherwise as may be convenient; that one may go to the jury while the other does not causes no difficulty. United States v. Yellow Cab Co., 340 U. S. 543, 555, 556, 71 S. Ct. 399, 95 L. Ed. 523; Bruckman v. Hollzer, 9 Cir., 152 F. 2d 730; Ring v. Spina, supra. The Fleitmann case of course requires that if treble damages are to be assessed, they must be on a verdict by a jury unless that has been waived by both parties, as provided in F. R. 38, 39. There is nothing in the Fleitmann case to hold more; and we do not believe sound policy consistent with greater restriction on the right to treble damages. See 52 Col. L. Rev. 1069, 1071; 61 Yale L. J. 1010, 1020, 1021, 1055, 1062. In fact Justice Holmes left open the case of a bill in equity for 'a decree directing the corporation to sue, or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf,' 240 U. S. at page 29, 36 S. Ct. 233, 234, 60 L. Ed. 505, which in substance is what this procedure amounts to under the wider scope of action now permissible."

Fanchon & Marco does not pretend to say that the Federal Rules of Civil Procedure have expanded the

right to trial by jury. It was recognized that under the old procedure a court of equity could have disposed of the jury trial problem by entering a decree directing the corporation to sue or, if it failed to do so, permitting the plaintiff to sue in its name and on its behalf on the common law side of the court. This juggling from one side of the court to the other is obviated by the merger of the law and equity under the Laws of Civil Procedure.

In *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, this Court held that:

> "Only under the most imperative circumstance, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

In *Thermo-Stitch, Inc. v. Chemi-Chord Processing Corp.* (5 Cir.) 294 F. 2d 486, the scope of *Beacon Theatres* was considered. The Court stated:

> "The mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial.
>
> It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly out-weighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it."

Minnesota Mutual Life Insurance Co. v. Brodish (D. C., E. D. P.) 200 F. Supp. 777, involved an action to declare two life insurance policies void because of fraudulent misrepresentations, wherein the defendant filed a counterclaim seeking recovery of the face amount of the policies. In deciding that the defendant was entitled to a jury trial, the Court stated:

> "The issue of fraudulent misrepresentation is decisive of the issue in both the plaintiff's suit and the counterclaim. For if the insured was guilty of fraudulent misrepresentation, the beneficiary cannot recover. This issue it is the defendant's right under the Seventh Amendment to have decided by a jury. Even were this a purely equitable proceeding, and not a statutory declaratory judgment action, the Beacon doctrine tells us that the longest footed chancellor may not cross the line established by the Seventh Amendment."

The 5th Circuit's interpretation of *Beacon Theatres* in *Thermo-Stitch, Inc.* is tacitly recognized by this Court in *Dairy Queen v. Wood*, 369 U. S. 469. See Note 8 on page 473. Among other things, this Court stated:

> "The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the federal rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circum-

stances.' Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury."

In *Rogers v. American Can Company* (3 Cir.) 305 F. 2d 297, the Court recognized that "under the broad concept of Federal Rule of Civil Procedure 2" there are no procedural problems which inhibit the maintenance of a stockholder's derivative action. The availability of a jury trial of the legal issues was deemed to be supported by *Fanchon & Marco* and demanded by *Dairy Queen*.

Assuming that this action was originally a stockholder's derivative action in equity, it must now be treated as a pure legal action. As a result of the first appeal, a remand was orderd "to provide an opportunity for Provident to join, or be joined in this lawsuit." (295 F. 2d 909, 914) After the remand, Provident asked to be substituted as party plaintiff. (R. 1473) The District Court granted this request. (R. 1490) and thereafter decided to "reallign" Provident as a party defendant. (R. 1708) Such "reallignment" was meaningless. The real party in interest is Provident. Provident's participation in this action was not produced by the exercise of the equitable powers of the District Court. Provident voluntarily elected to enforce as plaintiff a legal remedy which devolved upon it as successor to United. Although this may once have been a derivative action instituted by Gorsuch, it is not now and never was a derivative action commenced by Doig. It is now a common law action prosecuted by the plaintiff, Provident. If this case is retried, there is not one equitable issue to be considered.

After Provident entered the case as plaintiff, Respondent moved that judgmnt be entered in his favor on the verdicts rendered on March 18, 1960. In the alternative, Respondent, pursuant to Rule 38 of the Federal Rules of Civil Procedure, demanded a trial by jury of all of the issues involved herein. (R. 1630) The District Court rejected Respondent's request. (R. 1708) Under the circumstances, it cannot be rationally argued that the District Court did not deprive Respondent of his right to a jury trial as preserved by the Seventh Amendment to the Constitution of the United States.

If the granting or denial of a Writ of Certiorari with respect to this question is to be determined by reference to Rule 19 of this Court, we respectfully submit that the Writ must be denied. The decision of the Court of Appeals for the Ninth Circuit in this case is not in conflict with the decision of another Court of Appeals on the same matter, nor has it decided a federal question in a way in conflict with the applicable decisions of this Court. To the contrary, the opinion of the Court of Appeals is wholly consistent with, and in fact demanded by, the decisions of this Court.

II

CIVIL RULE 50(b) DOES NOT PERMIT A DISTRICT COURT TO ENTER JUDGMENT N.O.V. WHERE THE EVIDENCE CREATES A FACTUAL ISSUE AS TO DEFENDANTS' LIABILITY OR THE AMOUNT OF DAMAGES.

Petitioners attempt to find a question for review by this Court where one does not exist. It is conceded

that where, in a jury trial, a party has made a motion for a directed verdict at the close of all the evidence and the same is denied, the Court may, upon timely motion by such party, enter Judgment N.O.V.; provided, of course, that the moving party is entitled to judgment as a matter of law. In ruling on the motion, the trial court must, of course, view the evidence in the light most favorable to the party against whom the motion is made. *Continental Ore Company v. Union Carbide Corporation*, 370 U. S. 690.

In the case at bar, the Court of Appeals recognized that the amount of damages was in dispute. Predicated upon such conclusion, it held "that the trial court was without power to enlarge the jury awards against Sabo, Pegram and Landoe or to make an award against DePinto and Duhame who had escaped any jury award". The Court went on to say in a footnote: "It is therefore unnecessary to consider whether the trial court also erred in finding Appellants DePinto and Duhame liable, the jury having found neither of them liable". As we point out hereinabove, the evidence with respect to the amount of damage is not only in conflict, but will not, from any view thereof, support a judgment in the amount entered by the trial judge.

Petitioners, more or less parenthetically, argue that the Court of Appeals should have reviewed the evidence for the purpose of determining whether or not the trial court erred in concluding that there was no genuine issue of fact as to defendant's liability, to the end that the case might be sent back for a retrial as to the issue of damages only. Petitioners cite Civil Rule 59 and *Gasoline Products Co. v. Champlin*

Refining Co., 283 U. S. 494. Petitioners do not suggest that Rule 59 constitutes a mandate for such action, and the case which is cited militates against a partial retrial in an action of this kind.

We respectfully submit that there is no question for review by this Court with respect to the interpretation or application of Civil Rule 50(b) by the Court of Appeals, except as pointed out in our Cross Petition, infra.

CONCLUSION

In the light of Rule 19 of this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CROSS PETITION OF ANGUS J. DE PINTO FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross Petitioner, Angus J. DePinto, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the District Court is unreported. It is found in Appendix A in the Petition for Writ of Certiorari filed herein by the Petitioners Provident Security Life Insurance Company and John S. Gorsuch and Albert J. Doig. The opinion of the Court of Appeals is reported at 323 F. 2d 826 and is found in Appendix B of said Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1963. On November 20, 1963, the Court of Appeals denied the Petition For a Rehearing filed by DePinto and Duhame. The jurisdiction of this Court is invoked under 28 U. S. C., §1254 (1).

QUESTION PRESENTED FOR REVIEW

Where the trial court erroneously entered Judgment N.O.V. and the prevailing party did not join with his Motion For Judgment N.O.V. a Motion For New Trial, or pray for a new trial in the alternative, may the Appellate Court remand the case for a new trial rather than remand with instructions to enter judgment on the verdict?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The question presented for review involves Rule 50(b) of the Federal Rules of Civil Procedure, which reads:

> "(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged,

may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT OF THE CASE

Upon the original trial of this action, a jury rendered a verdict against Niesz, Sabo, Pegram and Landoe in the amount of Twenty Thousand Dollars ($20,000.00). The jury rendered a special verdict wherein it found that Cross Petitioner DePinto was not guilty of negligence or breach of fiduciary duty, which proximately caused or contributed to cause loss and damage to United Security Life. (R. 304) Plaintiff moved that all of the verdicts be set aside and that judgment be entered against DePinto and others, in accordance with plaintiff's Motion For a Directed Verdict, which was made at the close of the testimony. (R. 306) Plaintiff did not join with his Motion For Judgment N.O.V. a Motion For New Trial, nor did he pray for a new trial in the alternative. Judgment was entered pursuant to plaintiff's Motion. (R. 354)

In its opinion, the Court of Appeals stated:

"The trial court does have power, where the record warrants, to set aside a jury verdict for plaintiff, on the ground that the jury award of damages

is inadequate. But when that is done the only recourse is to grant a new trial. Where this procedure is followed, however, the granting of a new trial is not reviewable prior to the second trial, as it is an interlocutory order. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 254, 61 S. Ct. 189, 85 L. Ed. 147.

While appellees did not move for a new trial, and the trial court did not purport to grant one, the necessary effect of the order setting aside the verdict was, for the reasons indicated, to grant a new trial. Accordingly, we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts.

It follows that all questions presented on this appeal pertaining to the evidentiary showing as to negligence of breach of fiduciary duties may not be decided at this time.

There are also certain other questions presented on this appeal. But they are not of a kind which requires decision now in order to provide guidance as to the remanded proceedings. Nor will they be presented here again unless plaintiff prevails in the further proceedings and then only if the judgment is of the same kind as that which is before us on this appeal. If these questions do arise again, they can best be dealt with on the record for that appeal.

The judgment is reversed and the cause is remanded for a new trial." (323 F. 2d 838)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously interpreted and applied Rule 50(b) of the Federal Rules of Civil Procedure. When a Motion For Judgment N.O.V. is not accompanied by a Motion For New Trial, or a

prayer for new trial in the alternative, and where the record does not support a Judgment N.O.V., neither the trial court nor the Appellate Court has the power to grant a new trial after the expiration of ten (10) days from date of judgment.

ARGUMENT

The justification, if any, for the Court of Appeals to view the action of the trial court as the granting of a new trial with respect to the defendants against whom "inadequate" verdicts had been rendered does not apply to Cross Petitioner DePinto. The jury verdict was in his favor. The trial court had no alternative other than to enter Judgment for DePinto for the reason that "where uncertainty arises either from a conflict of testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law, but of fact, to be settled by the jury." *Best v. District of Columbia*, 291 U. S. 411, 415. So far as DePinto is concerned, the action of the trial court was, in both form and substance, no more nor less than the granting of a Judgment N.O.V. The trial court had no jurisdiction to grant a new trial except in strict accordance with Rule 50(b), or Rule 59 of the Federal Rules of Civil Procedure. The plaintiff did not move for a new trial, and the trial judge lost jurisdiction to grant a new trial, on his own initiative, ten days after the entry of judgment. *Gilliland v. Lyons* (9 Cir.) 278 F. 2d 56; *Chicago & N. W. Ry. Co. v. Britton* (8 Cir.) 301 F. 2d 400; *Tsai v. Rosenthal* (8 Cir.) 297 F. 2d 644. The jurisdictional limitation cannot be avoided by labeling or treating a Judgment N.O.V.

as an Order granting a new trial. The judgment was in no sense an interlocutory order. It was a final judgment, which the Court of Appeals had the power and duty to review under the provisions of §1291 of Title 28, *U. S. C.*

It appears to be the rule that when a trial court concludes that a proper basis exists for granting a timely, well-grounded Motion For Judgment N.O.V., it has a discretion to grant the lesser relief and to order a new trial instead if justice would thereby better be served. This is so, even though no motion for a new trial has been filed and even though ten days have elapsed since the entry of judgment. The discretion to grant the lesser relief, however, comes into being only when the record is such that the entry of Judgment N.O.V. would be warranted. Where, however, the record will not justify the direction of a verdict, and the Motion For Judgment N.O.V., though timely, cannot be granted; Rule 59(b) and Rule 59(d) then govern. If, under the circumstances stated, a Motion For New Trial is not made within ten days after the entry of judgment, the trial court has no power to enter an order for a new trial after the expiration of the ten-day period. *Jackson v. Wilson Trucking Corp.* (U. S. C. A., D. C.) 243 F. 2d 212. Also, see *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243; *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48.

Where a Judgment N.O.V. has been erroneously entered and the successful party has not, in the alternative, asked for a new trial, then upon reversal by a Court of Appeals the case should be remanded to the trial court with instructions to enter judgment on the

verdict. *Simonds v. Capital Transit Co.* (U. S. C. A., D. C.) 147 F. 2d 570; *Hanson v. Ford Motor Company* (8 Cir.) 278 F. 2d 586; *Hansen v. Firestone Tire & Rubber Co.* (6 Cir.) 276 F. 2d 254; *Vera Cruz v. Chesapeake & Ohio R. R.* (7 Cir.) 312 F. 2d 330; *Edwards v. United States* (6 Cir.) 140 F. 2d 526; *Bruin v. Tribble* (4 Cir.) 238 F. 2d 12.

We respectfully submit that the Cross Petition for a Writ of Certiorari should be granted for the reason that the decision of the Court of Appeals for the Ninth Circuit, insofar as it requires the trial court to grant a new trial rather than enter judgment on the verdict in favor of Cross-Petitioner DePinto, is in conflict with the decisions of numerous other Courts of Appeals as shown hereinabove.

Respectfully Submitted

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